Filed 3/19/09 Reguieg v. Sears CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

ADNAN REGUIEG et al., Plaintiffs and Appellants, v. HAL M. SEARS et al., Defendants and Respondents.	B203390 (Los Angeles County Super. Ct. No. BC364531)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles Lee, Judge. Reversed.

Steven W. Kerekes for Plaintiffs and Appellants.

Raiskin & Revitz and Steven J. Revitz for Defendants and Respondents.

Plaintiffs Adnan Reguieg and Ahmed Koudeimati ("plaintiffs") appeal the judgment entered following the trial court's grant of the motion for summary judgment of individual defendants Hal M. Sears and Michel Roy (hereafter "defendants") and corporate defendants Northridge Auto Body Partners, LLC and Northridge Collision Center, Inc. Because we determine that the proper resolution of this case involves disputed issues of fact, we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 1999, plaintiffs, who had been in the towing and auto body business for a number of years, and defendants, who were real estate professionals, agreed to pool their resources for the purchase of an auto body shop (the "Business"). Defendants, through their ownership of Northridge Auto Body Partners, LLC (the "Real Estate Holding Company"), acquired the real property on which the Business was located (the "Real Property"); defendants together contributed $250,000 in capital to complete the land acquisition.

The Business itself operated in the form of a corporation, Northridge Collision Center, Inc. ("NCCI"), in which the plaintiffs each held 25 percent of the shares while Sears and Roy held 30 percent and 20 percent, respectively. Plaintiffs together contributed $150,000 for the purchase of the Business, while defendants together contributed $150,000. The Business entered into a lease with the Real Estate Holding Company for the lease of the Business's premises.

Concurrently with the acquisition of the Business, plaintiffs and defendants agreed to a plan to permit plaintiffs to acquire a 50 percent interest in the Real Estate Holding Company.[1] Under this plan, if plaintiffs paid defendants 200 percent of the latter's capital contributions with respect to the Business and the Real Estate (which at that time

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[1]The original terms of this "buy-in" agreement are contained in a document entitled "Operating Agreement for Northridge Auto Body Partners, LLC," that is, the Real Estate Company, which is signed only by the individual defendants.

amounted to $400,000), including any subsequent contributions, on or before July 19, 2004, plaintiffs together would acquire a 50 percent interest in the Real Estate Holding Company.

Although the written terms of this plan did not specify how plaintiffs were to pay defendants this 200 percent of capital contributions, in practice defendants were paid a total of $15,000 per month by way of a distribution from the Business; if that practice had continued over the life of the agreement (54 months), defendants would have received $810,000, or approximately 200 percent of their $400,000 capital contribution. However, the Business soon began operating at a loss, and the monthly payments to defendants stopped in or about March of 2002.

In January of 2003, the parties restructured their deal. Their new agreement (the "Option Agreement") was memorialized in a resolution (the "Resolution") of the Board of Directors of Northridge Collision Center, Inc., the corporation which owned the Business. The parties agreed that an outside manager, Arthur Nalbandyan, would be retained to operate the Business. In consideration of Mr. Nalbandyan's investment of $120,000 in the Business, plaintiffs agreed to transfer to Mr. Nalbandyan that number of their own shares of stock in NCCI, which would vest in Mr. Nalbandyan a 15 percent interest in the corporation. The Option Agreement changed the outside date by which plaintiffs were required to complete their buy-in to January 1, 2007, and changed the amount of the monthly distribution payments to the defendants to $10,000.

Starting in June 2006, Mr. Reguieg inquired of the defendants the exact amount of their capital contribution, so that plaintiffs could calculate the final buy-in price. He received no response. When defendants, in response to a demand from plaintiffs' attorney, finally specified their total capital contribution, plaintiffs disputed the accounting. For instance, plaintiffs believed that defendants' figure included two short-term loans from Sears which had been repaid with interest, as well as a failure to credit certain sums in connection with a refinancing of the Real Property. On December 18, 2006, plaintiffs tendered to defendants $78,214, which represented their calculation of the remaining balance due under the Option Agreement.

On December 22, 2006, defendants' attorney notified plaintiffs not only that defendants contended that the tendered payment was insufficient under the terms of the Option Agreement (defendants put the figure at $512,120.36), but that, because the funds were drawn on Mr. Koudeimati's personal bank account, the payment did not meet the requirement of the Option Agreement that the buy-in funds come "out of cash flow from the business operations." This was the first time that plaintiffs learned that defendants were interpreting the Option Agreement to provide that the buy-in funds could only come from distributions from the Business.

Plaintiffs filed suit against Messrs. Sears and Roy, as well as the two corporate entities, alleging causes of action for breach of contract, fraud and deceit, for an accounting, and for declaratory, injunctive, and other equitable relief. The individual defendants and NCCI cross-complained against plaintiffs, alleging causes of action for breach of contract, breach of fiduciary duty, and declaratory and injunctive relief.

Defendants moved for summary judgment or, in the alternative, summary adjudication. They maintained that there were no triable issues of fact regarding whether (1) the Option Agreement required that the money for plaintiffs' purchase of their 50 percent interest in the Real Estate Holding Company was to come solely from distributions of the Business, and (2) plaintiffs failed to tender 200 percent of defendants' capital contributions as required by the Option Agreement, and (3) the plaintiffs' covenant not to compete was enforceable. The trial court granted the motion and entered judgment for defendants. As explained in its tentative ruling, the trial court determined that the purchase price "was to be paid out of [the Business's] earnings and not from plaintiff[s'] personal funds. Plaintiffs admit this. (Oppo. Sep. St., fact no. 41.) Yet, plaintiffs attempted to exercise the option with personal funds (which were also inadequate). Thus, there is no triable issue as to whether plaintiffs were in compliance with the modified Option in the resolution; they were not, and the option lapsed."

Plaintiffs timely appealed the judgment.

STANDARD OF REVIEW

"Summary judgment is properly granted when the evidence in support of the moving party establishes that there is no issue of fact to be tried. [Citations.] The trial court must decide if a triable issue of fact exists. If none does, and the sole remaining issue is one of law, it is the duty of the trial court to determine the issue of law." (*Torres v. Reardon* (1992) 3 Cal.App.4th 831, 836.)

"[W]e review the record de novo, considering all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 334.) "This court exercises its independent judgment as to the legal effect of the undisputed facts disclosed by the parties' papers. In so doing, we apply the same three-step analysis required of the trial court: We first identify the issues framed by the pleadings, since it is these allegations to which the motion must respond. Secondly, we determine whether the moving party has established facts which negate the opponents' claim and justify a judgment in the movant's favor. Finally, if the summary judgment motion prima facie justifies a judgment, we determine whether the opposition demonstrates the existence of a triable, material factual issue." (*Torres v. Reardon*, *supra*, 3 Cal.App.4th at p. 836, internal citations omitted.)

DISCUSSION

1. *Option Agreement*

The contractual provision at issue in this lawsuit is contained in paragraph 8 of the Resolution. It reads:

> "The owners covenant and agree that at such time, but no later than the expiration of four (4) years after the date hereof, as Michel Roy and Hal M. Sears have been paid out of cash flow from the business operations and not out of lease rentals or distributions from the real estate, a sum equal to two hundred percent (200%) of the full amount of their capital contributions then made by them with respect to the Property and the business thereon (which 200% payment amount is

estimated to be approximately $950,000 or more), including any subsequent capital contributions at such time made by them and provided that none of the Operating Group (Adnan Reguieg, Steve Koudeimatie [sic] and Arthur Nalbandyan) are then in default of any of their obligations owed to the Company, or to the LLC owning the real estate, or with respect to the business conducted upon the Property, the Operating Group shall have the right and option to automatically acquire, for no additional consideration, equally from each of Michel Roy and Hal M. Sears, a total of a fifty percent (50%) percentage ownership interest and a fifty percent (50%) net profits and net losses percentage in the Northridge Auto Body Partners, LLC, the LLC owning the real estate, as a non-voting, non-Managing Member; provided, however it is agreed and understood that Arthur Nalbandyan shall not receive any ownership interest in the real estate. . . . In the event, however that the Operating Group shall for any reason fail to pay the full amount of such 200% capital return in accordance with the above to Michel Roy and Hal M. Sears, within the time period provided above, there shall be no transfer of any ownership interest in the real estate or any additional percentage whatsoever and the Operating Group shall have no equitable right to any such ownership (and expressly waives any claim to any equitable right to ownership), and no amounts then paid by the Operating Group shall be refunded, it being acknowledged and agreed that this provision has been fully discussed and understood, freely negotiated and agreed to by all parties and constitutes a material consideration for entering into this agreement. Time is strictly of the essence of this agreement."

Notwithstanding that the contract itself does not specify that the buy-out funds are to come *solely* from the cash flow of the Business, Defendants argued below that the plain meaning of the phrase "at such time . . . as [defendants] have been paid out of cash flow from the business operations and not out of lease rentals or distributions from the real estate" unambiguously limited the source of the funds for plaintiffs' buy-in monies to cash distributions of the Business. Defendants therefore rejected plaintiffs' "balloon payment" which was paid from Mr. Koudeimati's personal funds, and declared that the option had expired unexercised.

Plaintiffs contended that they had agreed to no such limitation on the source of their buy-in funds, and that this language was included in the Option Agreement to make clear that any distributions from, or lease payments to, the Real Estate Holding Company were not to be credited to plaintiffs' buy-in amounts. Plaintiffs further maintained that defendants acknowledged this interpretation of the agreement when they agreed that monthly deficiencies in the cash distributions of the Business would be made up by way of a balloon payment at the time the option was exercised. Evidence presented in support of this fact included the declaration of Mr. Nalbandyan: "Sears indicated at that meeting that [plaintiffs] should remember that there was – there would be a balloon payment due on the option monies in a little over a year, and they should make sure that they had their money ready to pay the balloon that would be due."

In its tentative ruling, adopted by the trial court as its final ruling, the court stated: "It seems quite clear that [the] option was to be paid out of NCCI's earnings and not from plaintiff's personal funds.[2] Plaintiffs admit this." Thus, it appears that the trial court ruled that the terms of the option were unambiguous. In this the court erred.

Initially, we note that, contrary to the trial court's remark that plaintiffs admitted that the Option Agreement required the buy-in funds to come solely from the cash flow of the Business, plaintiffs disputed this "fact." Defendants' Undisputed Fact No. 41, which the trial court cited in support of plaintiffs' "admission," reads: "The checks tendered by Koudeimati did not represent cash flow from the business operations of NCCI." Plaintiffs' response to this statement was: "Undisputed that the balance due on the option price was paid from Koudeimati's personal moneys in December, 2006." This is simply not an admission that the funds were supposed to be paid out of the Business.

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[2] We note that the source of the court's clarity on this issue is not the contract language itself; the contract does not state that plaintiffs' personal funds may not be used to pay the option price.

In fact, in response to Defendants' Undisputed Fact No. 40, to the effect that defendants refused plaintiffs' tender because they were personal, rather than Business funds, plaintiffs stated: "Undisputed as to the fact that Sears and Roy refused the tender. Disputed as to the fact that the balance of the option moneys being tendered had to come from NCCI." Thus, we turn to the contract language to determine whether it permits of but one interpretation, to wit: the defendants'.

"The trial court's determination of whether an ambiguity exists in a contract is a question of law, subject to independent review on appeal. The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. . . . Furthermore, when two equally plausible interpretations of the language of a contract may be made, parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact that precludes summary judgment if the evidence is contradictory." (1 Witkin, *Summary of Cal. Law* (10th ed. 2005) Contracts, § 41, p. 828, internal citations omitted.)

Here, the contract language indicates that plaintiffs' buy-in payments are to come from the cash flow of the business. The contract does not, however, specify that this is the *only* permissible source of funds. Plaintiffs' interpretation of the contract language – that the contract permitted plaintiffs to make up any shortfall in the buy-in monies out of their personal funds – is at least as plausible as defendants' position that the contract limited the source of plaintiffs' buy-in funds to distributions from the Business. Thus, plaintiffs were entitled to a trial to resolve the disputed factual issues underlying the proper interpretation of the Option Agreement.

Neither can defendants rely on the trial court's finding that the plaintiffs' personal funds were "inadequate" to satisfy their buy-in obligations. The parties clearly disagree on the amount of defendants' capital contributions to the Business and the Real Estate Holding Company. Both plaintiffs and defendants provided documentary evidence supporting their respective positions. This is a disputed issue of material fact, rendering summary judgment unavailable.

Likewise, defendants argue that, in any event, plaintiffs were in material breach of their obligations under the Option Agreement, and therefore were not eligible to exercise the option. However, this "fact" was the subject of intense debate. For instance, defendants maintain that plaintiffs breached their duties to the defendants and the Business by the use of certain accounting methods which defendants questioned. However, it is undisputed that the Business engaged the services of Mr. Nalbandyan to manage the business. Thus, it is not at all clear that plaintiffs can be charged with any impropriety concerning the operations or finances of the Business.

Moreover, since defendants accepted over $400,000 in partial payment of the buy-in price without objecting to plaintiffs' supposed breaches of conditions to the buy-in, plaintiffs are entitled to an opportunity to establish that those conditions were not material, and/or were waived.

In short, resolution of this lawsuit requires factual findings on multiple disputed issues of material fact. Summary judgment was therefore not appropriate in this case.

2. *Covenant Not to Compete*

The same Resolution of the Board of Directors of NCCI which contained the terms of the Option Agreement also contained the following covenant not to compete (the "Covenant"):

> "As a material inducement to the Investor Group [Sears and Roy] and with the understanding that Adnan A. Reguieg and Mohammed Koudeimati [and Arthur Nalbandyan] ('Operator') are intended to be the manager and operator of the business conducted by the Company, Operator covenants and agrees for the benefit of Hal Sears and Michael Roy, and Hal Sears and Michael Roy covenant for the benefit of Operator, that they will not, for a period of twenty (20) years from and after date hereof (the 'Covenant Period'), engage, directly or indirectly, in any capacity, whether as partner, operator, employee or otherwise in the business of automobile body shop, or on behalf of any insurance company work in such capacity, within a radius of ten (10) miles from the business property . . . ."

Plaintiffs sought declaratory relief to the effect that the Covenant was void or voidable under California law. While the trial court did not specifically rule on the merits of this cause of action, we must infer such a ruling given the judgment entered in favor of defendants.

Business and Professions Code[3] section 16600 provides that, "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." As our Supreme Court recently noted, "Today in California, covenants not to compete are void, subject to several exceptions . . . ." (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 945.) Thus, in order to be valid, the Covenant must fall within one of the statutory exceptions to section 16600.

A covenant not to compete may be valid in connection with the sale of a business (section 16601), the dissolution of a partnership or of a partner from the partnership (section 16602), or the dissolution of, or the termination of a member's interest in, a limited liability company (section 16602.5). None of these exemptions applies to the facts of this case.

Defendants argue that "The relationship of [plaintiffs] to NCCI [the corporation conducting the Business] is similar to that of a partner in a partnership or the member of a limited liability company. Therefore, it is submitted that the Covenant is not prohibited by Section 16600." Even if this were so, the plaintiffs' interest in the Business continues; thus the requirements of section 16602 and 16602.5 – that the partnership or LLC dissolve, or that the partner or member withdraw – were not met.

Defendants also contend that "Since [plaintiffs] were/are officers and directors of NCCI, it would be a breach of their fiduciary duties to that company to open a competing business." If plaintiffs breach their fiduciary duties to the corporation, they are subject to

[3] Further statutory references are to this code.

suit by the corporation. That fact does not authorize the individual defendants to prosecute, on their own behalf, any supposed corporate claims against the plaintiffs.

Finally, defendants argue that, because the Covenant was limited geographically to 10 miles and temporally to 20 years, it did not violate section 16600's prohibition on restraint of trade, citing a line of cases which hold that narrowly drawn restrictions to the practice of one's trade or profession do not violate section 16600. (See, e.g., *Jones v. Humanscale Corp.* (2005) 130 Cal.App.4th 401; *General Commercial Packaging, Inc. v. TPS Package Engineering, Inc*. (9th Cir. 1997) 126 F.3d 1131; *King v. Gerold* (1952) 109 Cal.App.2d 316.) The Supreme Court expressly rejected this proposition in *Edwards v. Arthur Andersen LLP*, *supra*, 44 Cal.4th 937: "Section 16600 is unambiguous, and if the Legislature intended the statute to apply only to restraints that were unreasonable or overbroad, it could have included language to that effect. We reject [respondent's] contention that we should adopt a narrow-restraint exception to section 16600 and leave it to the Legislature, if it chooses, either to relax the statutory restrictions or adopt additional exceptions to the prohibition-against-restraint rule under section 16600." (*Id*. at p. 950.)

In sum, because the Covenant does not come within any of the statutory exceptions to the prohibition on restraint of trade contained in section 16600, it is not enforceable.

DISPOSITION

The judgment is reversed. Plaintiffs are to recover their costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P. J. MOSK, J.